Supreme Court, U. S.
FILED
FEB 6 1979
MICHAEL RODAK, JR., CLERK

No. 78-865

In the
Supreme Court of the United States
October Term 1978

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE,

Petitioner,

vs.

IN RE
BERT F. INGELS and EILEEN K. INGELS,
BANKRUPTS,

and

WILLIAM H. CHRISTISON, Trustee,

Respondents.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

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STATEMENT OF ISSUES

I. Whether The Bankruptcy Court Could Assert Jurisdiction over Encumbered Property By Approving Sale Thereof Free and Clear of Liens, When There Was No Equity Or Interest That Could Inure To The Unsecured Creditors, Particularly When The Paramount Lienholder Objected To Such Sale.

II. Whether It Was Denial Of Due Process Of Law To Order The Sale of Secured Property Without Any Evidentiary Hearing At A Pre-Trial Conference.

STATEMENT OF THE CASE

Bert F. Ingels and Eileen K. Ingels were adjudicated bankrupts. William H. Christison was appointed Receiver and subsequently Trustee. The bankrupts listed certain real estate in Schedule B-1 and William H. Christison, as Receiver and subsequently Trustee, took immediate possession of the real estate. The Trustee entered into a stipulation with the Small Business Administration, a junior lien creditor, which stipulation provided for a sale of the real estate. The Trustee obtained an offer of $132,500 and filed a complaint in the Bankruptcy Court to sell the real estate. All lien creditors were made parties defendants, served with summonses and given proper notice. One creditor, after receiving summons and notice, defaulted and never entered its appearance throughout any of the proceedings. All other lien creditors except Petitioner consented to the sale. The Bankruptcy Court ordered the sale free of liens with liens to attach to the proceeds. There is no dispute that Petitioner's lien was allowed and held valid in the amount of $51,576 by order of the Bankruptcy Court and the Trustee was ordered to pay said lien to Petitioner in full from the proceeds of the sale at the time of closing. Petitioner, Peoples Savings and Loan Association of Chillicothe, appealed the order but failed to file the supersedeas bond set by the Bankruptcy Judge. The supersedeas bond had been set in the amount of $60,000 because of possible loss of the existing offer of $132,500 in the event of delay. The real estate consisted of a large luxurious type residence house in the country for which there was a limited market. The offerors, and subsequent purchasers of the residence, informed the Trustee that they would not continue their offer for

a period of months in the event of delay. The United States District Court affirmed the order of the Bankruptcy Court, the sale of real estate was completed by the Trustee, the real estate was conveyed to the purchasers, a Chicago Title Insurance Company title policy was issued to the purchasers insuring the title, and the proceeds from the sale were distributed to the lien creditors. Petitioner, Peoples Savings and Loan Association of Chillicothe, was paid in full its principal and interest on September 26, 1977, cancelled its notes and mortgages as paid in full and returned the same to the bankrupts with copies to the Trustee. Petitioner has persisted in its appeal of the order of sale, to the United States Court of Appeals for the Seventh Circuit, where the District Court was affirmed, and now with its Petition to the Supreme Court of the United States.

ARGUMENT

I.

WHETHER THE BANKRUPTCY COURT COULD ASSERT JURISDICTION OVER ENCUMBERED PROPERTY BY APPROVING SALE THEREOF FREE AND CLEAR OF LIENS, WHEN THERE WAS NO EQUITY OR INTEREST THAT COULD INURE TO THE UNSECURED CREDITORS, PARTICULARLY WHEN THE PARAMOUNT LIENHOLDER OBJECTED TO SUCH SALE.

In a case involving a Bankruptcy Court sale of real estate free of liens, including real estate tax liens, the Court discussed the general equity powers and the duty to collect, reduce to money and distribute the estates of bankrupts and to determine controversies with relation thereto. The Court states "to transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power, and legislation conferring it is obviously constitutional." *Van Huffel* v. *Harkelrode,* 284 U.S. 225.

In re Hout, 9 F.Supp. 419, it was stated that the Court had exclusive jurisdiction to sell the real estate of the bankrupt in spite of the claim that there was no equity in the property for the bankruptcy estate, reaffirming the decision of *In re Sloterbeck Chevrolet Company,* 8 F.Supp. 1023.

Petitioner's citation of *In re Bernard Altman,* 226 F. Supp. 201 is nowhere near on point. It involves a chapter XI proceeding in which the mortgagee-petitioner had previously commenced a foreclosure, had a buyer of its own to whom it wanted the Court to sell the property, and its mortgage indebtedness exceeded the purchase price of the

offer before the Bankruptcy Court so that any sale free of liens by the Court would result in the mortgagee being paid less than the balance due it. In the instant case Petitioner-Mortgagee was to be paid and was paid 100% of its debt, both principal and interest.

The *Altman* Case as well as *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555 and *In re Miller,* 95 F.2d 441, and 4 *Collier on Bankruptcy* (14th ed.) Sec. 70, all cited by Petitioner, stand for the proposition that there should be a fair prospect that the sale bring a sufficient amount to discharge the lien if not to produce a surplus to general creditors. None of the cases cited by Petitioner have to do with a mortgagee who is to be paid its debt in full.

The case *In re Miller,* 95 F.2d 441, cited by Petitioner, holds that the Bankruptcy Court had the power to sell free of liens and whether it should do so was within its sole discretion. The lien holder had consented to the sale and joined in the petition on the claim that such sale by the Bankruptcy Court could be had with less delay, less cost and more efficient results than a foreclosure, and would result in a higher sale price. This is exactly the position of the junior lien holders in the case before the Court. The Small Business Administration consented to and required such sale for those very reasons. The Petitioner as first lien holder was clearly to be paid in full from sale proceeds. The objection to the sale by Petitioner showed no way the Petitioner could be prejudiced and contained no legitimate basis for disallowing said sale. Petitioner's argument makes mention of the purpose of th sale being for "the improper building of fees by the Trustee." It is obvious that the only purpose of counsel for Petitioner's objection to the sale was to enable him to foreclose the mortgage and thus charge a fee for him-

self to the detriment of junior lien holders. When questioned on the subject of fees by the Bankrupcty Judge and being offered an opportunity to present evidence as to costs and fees incurred by and on behalf of his savings and loan association client, counsel for Petitioner refused, as is found in the order of July 1, 1977 by the Bankruptcy Judge in paragraph 10 (See Addendum I).

Standard Brass Corp. v. *Farmers National Bank of Belvedere,* 388 F.2d 86, cited by Petitioner on page 5 of its Petition, is a case involving the attempt of the Trustee to assess costs of sale against the lien holder to the end that the lien holder was not paid in full. Petitioner, Peoples Savings and Loan Association of Chillicothe, as the first mortgage holder, had a contractual right to be paid back the principal amount of its loan with interest. It is obvious that the transfer of its $51,576 lien to the proceeds of sale amounting to $132,500 by the order of the Bankruptcy Court could not possibly prejudice it in any way. It's only interest in the real estate was completely protected, and no other creditors, unsecured or secured, raised any objection to the sale as pointed out in the decision and order of the U. S. District Court of September 9, 1977, affirming the order of the Bankruptcy Judge. The July 1, 1977 order of the Bankruptcy Court (Addendum I) upheld the validity of Petitioner's mortgage lien in full and ordered it to be paid at the time of closing of the sale which was done. No attempt was made to assess any costs to Petitioner and it received payment of principal and interest in full on September 26, 1977. On said date the Trustee personally paid Petitioner in full and received copies of the notes and mortgages stamped "paid in full." If the Trustee had attempted to assess costs of sale to the Petitioner it might have had a meritorious argument against the sale. In *Reconstruction Finance Corporation* v. *Rhodes,* 214 F.2d 606, the lien creditors objected to the sale by the Trustee, the Referee ordered the sale and the proceeds were not sufficient to pay all liens. The Trustee failed in his attempt to have costs of sale assessed to the lien creditors. The Court stated that "the rule is well settled where the lien creditor in a mortgage or deed of trust does not consent to a sale free of liens, his contribution to the bankruptcy estate is limited to the costs of foreclosure under state law." In the instant case Petitioner has been paid in full and has not even incurred those costs it might have incurred in a state court foreclosure. The junior lien creditor, the Small Business Administration, consented to the sale and to the costs of administration and sale being paid from its share of the proceeds from the sale of real estate. The Court held in the case of *In re Casaudoumecq* 46 F.Supp. 718, that "the Bankruptcy Court, in its exclusive control of the administration of the bankrupt's estate, has full power to determine the method of foreclosure of liens upon the property of the debtor, or bankrupt, where such property is in the actual or constructive possession of the court. While ordinarily the Bankruptcy Court will permit outside foreclosure where it appears there is no equity in the property, it is within the discretion of that court not to do so and to handle the foreclosure itself in spite of an apparent lack of probable surplus for the bankruptcy estate." The Court cited *In re American Fidelity Corp.,* 28 F.Supp. 462, and in *In re Hout,* 9 F.Supp. 419. "The rule that valid liens shall not be disturbed by bankruptcy proceeding has reference entirely to the validity and obligations of the contract and not to the remedies for enforcing the lien holder's rights, which can be changed without impairing the obligations of the contract so long as an equally adequate remedy is afforded." The Court cited *Alleback* v. *Thomas,* 16 F.2d 853 and *In re Jersey Island Packing Company,* 138 F. 625.

"Sales in the Bankruptcy Court are usually preferable to sales elsewhere because an impartial court can control the sales price to the end that the highest price obtainable can be had through the continuances of the sale until the goal is reached." The court again cited *Alleback* v. *Thomas, supra.*

The case *In re Keet,* 128 F. 651, also stands for the proposition that a sale free of liens may be justified for reasons of a more expeditious and less expensive liquidation.

Under Section 70(a)(3) of the Bankruptcy Act, the Trustee is vested with the title of the bankrupt to powers which he might have exercised for his own benefit including the power to pay a debt owed by the bankrupt and to obtain the security pledged therefor. The bankrupt could have sold the real estate without any notice to the Petitioner and paid off the mortgage out of the proceeds of sale. It could be argued that the Trustee merely did the same after giving due notice to the mortgagee that he intended to do so.

II.

WHETHER IT WAS A DENIAL OF DUE PROCESS OF LAW TO ORDER THE SALE OF SECURED PROPERTY WITHOUT AN EVIDENTIARY HEARING AT THE PRETRIAL CONFERENCE.

Wright v. *Union Central Life Insurance Co.,* 304 U.S. 502, 58 S.Ct. 1025 (1938), cited by Petitioner, is easily distinguishable. That case had to do with the altering of property rights of a mortgagee by the Bankruptcy Court's extension of the period of redemption for three years, which was upheld by the Supreme Court as not violating any constitutional principal. The quotation referred to by Petitioner is in its entirety (on page 518) as follows:

"Property rights do not gain any absolute inviolability in the Bankruptcy Court because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the Bankruptcy Court to affect these property rights, provided the limitations of the due process clause are observed."

Mathews v. *Eldridge,* 96 S.Ct. 893 (1976) cited by Petitioner, deals with termination of disability benefits and is not remotely related to the case at issue. The case does hold on page 909: "The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." Petitioner has demonstrated no loss whatsoever and it did have its opportunity to be heard in Court.

Wolff v. *McDonnell,* 418 U.S. 539, 94 S.Ct. 2963 (1974) cited by Petitioner, is a criminal case and has no bearing whatsoever on the issues in the instant case.

Petitioner complains about the procedure called for by Part VII of the Rules of Bankruptcy and an evidentiary hearing. All rules of bankruptcy governed by Part VII were complied with, proper notices were given and proper summonses were served. At the hearing in question counsel for Petitioner was repeatedly offered the opportunity by the Bankruptcy Judge to present any evidence he had to support his position, but he refused. All other parties to the proceeding who were present, pursuant to proper notices to all parties in interest, consented to the sale. Petitioner complains of being deprived of certain alleged property rights. All of those rights pertain to a method of enforcing its contractual rights to be repaid the money it loaned the bankrupts. No foreclosure had been commenced prior to bankruptcy, the premises were not in the

possession of Petitioner and prior to the Trustee's Complaint for Sale being filed, Petitioner never applied to the Court for leave to foreclose. In the Bankruptcy Court order of July 1, 1977, (see Addendum I) Petitioner's contractual right to be paid was fully secured and protected and in fact it was repaid in full. There was no impairment of its contractual rights or constitutional rights.

Petitioner has suffered no damage whatsoever having received in full exactly what it contracted for.

CONCLUSION

For the reasons above stated and the reason that Petitioner has shown no damage or injury whatsoever, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

/s/ William H. Christison, Trustee
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ADDENDUM I

UNITED STATES DISTRICT COURT
For The Southern District Of Illinois

IN RE
BERT F. INGELS and EILEEN K. INGELS
Bankrupts

WILLIAM H. CHRISTISON, TRUSTEE
Plaintiff

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE, et al.
Defendants

Bankrutcy Nos.
77-10020/C/D
77-10021/C/D

ORDER

(Filed July 1, 1977)

This matter coming on for hearing on the complaint of William H. Christison, trustee in the above captioned matter, and the court having heard arguments of counsel and being fully advised in the premises finds as follows:

1. That William H. Christison is the duly appointed, qualified and acting trustee in the above named bankruptcy estates.

2. That summons was issued and served on defendants in manner and form as prescribed by law and the court has jurisdiction over all defendants herein and the subject matter herein.

3. That the United States of America, defendant, has filed its answer consenting to said sale.

4. That Howard Marshall Agency, Inc. has filed its answer consenting to the sale.

5. That General Finance Corporation, defendant, has filed its answer and consented to the sale.

6. That Distribix, Inc. has failed to answer or otherwise appear but has made default.

7. That Peoples Savings & Loan Association of Chillicothe has filed its answer objecting to the sale.

8. That the trustee plaintiff has filed a motion to strike certain portions of the answer filed by Peoples Savings & Loan Association of Chillicothe, which motion is granted and Peoples Savings & Loan Association of Chillicothe has filed a motion to replead, which is granted and has filed a new answer instanter.

9. That Peoples Savings & Loan Association of Chillicothe, defendant, states that the amount due it under its rights will be violated if it is not afforded the opportunity to foreclose its mortgage and objects to the sale on the grounds that there is no equity for unsecured creditors in said real estate to the end that the trustee should not be permitted to make such sale.

10. That the amended answer filed instanter at said hearing by Peoples Savings & Loan Association of Chillicothe, defendant, states that the amount due it under its mortgage is the sum of $51,576.16 as of June 10, 1977 plus interest and other additional amounts due it under the terms of said mortgage and note, and at the said hearing the court gave an opportunity to counsel for said defendant to submit any additional expenses and fees to which it claims it is entitled but no additional

evidence or claim for additional expenses and fees was presented by said defendant.

11. That the trustee plaintiff has filed a stipulation by and between him and the Small Business Administration, an agency of the United States of America, which requested the trustee to proceed with said sale and agreed to pay said trustee expenses and costs of administration not to exceed ten percent (10%) or not to exceed fifteen percent (15%) in the event the services of a real estate agent was used.

Wherefore, It Is Ordered, Adjudged and Decreed as follows:

1. That Distribix, Inc. has failed to answer or otherwise appear and is defaulted.

2. That the motion to strike certain portions of the answer filed by Peoples Savings & Loan Association of Chillicothe, defendant, is allowed.

3. That the motion by Peoples Savings & Loan Association of Chillicothe to replead is allowed and the new answer of said defendant is allowed to be filed instanter.

4. That the sale of the real estate hereinafter described to Russel W. Wendland for the price of $132,500.00 is approved and authorized on the terms and conditions set forth in trustee plaintiff's complaint and the offer to purchase attached thereto.

5. That said sale is free and clear of all liens, claims and encumbrances, with said liens, claims and encumbrances to attach to the proceeds of sale in the following manner:

A. That the mortgage of Peoples Savings & Loan Association of Chillicothe, defendant, both principal and interest attach to the proceeds of sale in full and the proceeds in an amount sufficient to pay said mortgage be disbursed to Peoples Savings & Loan Association of Chillicothe at the closing.

B. That the lien of General Finance Corporation, defendant, attach to the proceeds of sale in the amount of $10,000.00 in accordance with a prior order entered by this court and said sum be disbursed to said defendant at the time of closing.

C. That the balance of the proceeds of sale be paid to the Small Business Administration, an agency of the United States of America, in accordance with the stipulation previously filed herein by the trustee and said Small Business Administration and that said proceeds be disbursed to said defendant at the time of closing.

6. That in the event Peoples Savings & Loan Association of Chillicothe, defendant, appeals this order, an appeal bond is hereby set in the amount of $60,000.00.

7. That the clerk of this court issue an order to show cause why said sale should not be confirmed, giving to all interested parties and creditors an opportunity to bid a higher amount and that said order to show cause have a time and date certain and give notice thereof to all creditors and interested parties.

/s/ Max J. Lipkin

Judge

ADDENDUM II

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Bankruptcy Nos. 77-10020
77-10021

IN RE
BERT F. INGELS, EILEEN K. INGELS
Bankruptcy

WILLIAM H. CHRISTISON, Trustee

Plaintiff,

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION OF CHILLICOTHE, et al

Defendants.

DECISION AND ORDER ON APPEAL

Peoples Savings and Loan Association of Chillicothe appeals from an order of the Bankruptcy Judge, dated July 20, 1977, which finally authorized sale of real estate of the bankrupts by the trustee, after notice to creditors and proceedings of record in the bankruptcy court, for $132,500, free of liens, with such liens to attach to the proceeds. A previous order, still effective, provides that the loan of said appellant to the bankrupt, both principal and interest, be first paid out of the proceeds of said sale. Appellant's Amended Answer in the bankruptcy court asserts that said loan balance was $51,576.16 as of June 10, 1977, so it is abundantly clear that said loan will be repaid in full.

One creditor, entitled to notice, defaulted, but all others, except appellant, consented to said sale. The Bankruptcy Judge set a supersedeas bond in the amount of $60,000 for this appeal because of possible loss to the estate of the existing offer of $132,500, in the event of substantial delay. Appellant asserts that this is excessive, and there is no indication in the record here that any appeal bond has been filed. Appellant has filed a Memorandum of Law here, which is about six days beyond the ten days permitted by Rule 601 of the Bankruptcy Rules of this court, but which has been considered in this decision, issued without oral argument, under the terms of said rule.

Appellant's contentions of lack of due process of law under the Constitution can only be described as specious, in view of complete protection of its financial security interest, which is the only interest it can be reasonably considered to have had in the real estate in question. It has no legitimate basis for criticism of the bankruptcy court procedures which were employed. It also contends here that there is no benefit to the bankruptcy estate in the proceeding, but it is apparently alone in that belief, and is hardly in a position to complain unless it can show prejudice of some kind.

The only other point argued in appellant's memorandum is its "Second Affirmative Defense" asserted in its Amended Answer of June 30, 1977, that this proceeding has impaired its contract rights to foreclose its mortgage, and in that event to have possession, with its benefits, to rents, profits, etc., all in violation of the United States and Illinois constitutions. It seems only necessary to note that these rights existed by contract only to protect the mortgagee in recovery of its loan with agreed interest, which

the order of the Bankruptcy Judge does. There is not impairment of contract or property rights or constitutional violation. It would require ignoring of the Bankruptcy Act completely to conceive, even theoretically, that appellant will not receive all it contracted for. The Order of the Bankruptcy Judge herein must be affirmed in all respects.

Accordingly, It Is Ordered that the Orders of the Bankruptcy Judge herein, dated July 1, July 8 and July 20, 1977, are Affirmed.

Entered September 9, 1977

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ROBERT D. MORGAN
United States District Judge

ADDENDUM III

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 11, 1978.

(Argued April 19, 1978)

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. LEONARD PAGE MOORE, *Senior Circuit Judge*•

Hon. WILLIAM J. BAUER, *Circuit Judge*

• The Hon. Leonard Page Moore, United States Court of Appeals for the Second Circuit, is sitting by designation.

IN RE
BERT F. INGELS, EILEEN K. INGELS,
Bankrupts.

WILLIAM H. CHRISTISON, Trustee,
Plaintiff-Appellee,

vs.

PEOPLES SAVINGS AND LOAN ASSOCIATION
OF CHILLICOTHE,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois,
Peoria Division.
Nos. 77-1094, 77-1095
ROBERT D. MORGAN, *Judge*

ORDER

The court, having read the briefs, addressed itself to the record, and heard oral argument, announced in open court that the judgment appealed from is Affirmed.

The court can see no reason for excluding this property from the bankruptcy proceedings since the appellant will get all the money and interest to which it is entitled in these proceedings.

Similarly, we find no want of opportunity to present evidence or make contentions in the proceedings below, and thus no violation of procedural due process.

Accordingly, the Clerk of this court is directed to enter judgment Affirming the judgment below.

Affirmed.